No. 10-334

In the Supreme Court of the United States

CATHERINE ROBERSON, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
MARTIN F. HOCKEY, JR.
ALLISON KIDD-MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether former 38 U.S.C. 1151 (1994) allowed petitioner to recover benefits relating to her husband's death without demonstrating that Department of Veterans Affairs medical personnel should have diagnosed and treated his non-service-connected cancer.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statute involved 2
Statement 2
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Case:

Brown v. *Gardner*, 513 U.S. 115 (1994) ..... *passim*

Statutes and regulations:

Act of Sept. 2, 1958, Pub. L. No. 85-857, Pt. II, § 351, 72 Stat. 1124 2
Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a), 105 Stat. 406 2
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, § 422(a), 110 Stat. 2927 12
38 U.S.C. 1151 (1994) ..... *passim*
38 U.S.C. 1151 ..... 3, 12
38 U.S.C. 1151(a)(1)(A) 3
38 U.S.C. 7292(d)(2) 12
38 C.F.R.:
Section 3.357(c) (1990) 11
Section 3.358 11
Section 3.358(c)(1) 11
Section 3.358(c)(2) 11

In the Supreme Court of the United States

No. 10-334

CATHERINE ROBERSON, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 607 F.3d 809. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 21-40) is reported at 22 Vet. App. 358. The opinion of the Board of Veterans' Appeals is unreported, but is available at 2005 WL 3916807.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2010. The petition for a writ of certiorari was filed on September 7, 2010 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Former 38 U.S.C. 1151 (1994) provided, in pertinent part:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

STATEMENT

1. Where applicable, the former version of 38 U.S.C. 1151 (1994) provides for an award of benefits when, "as the result of hospitalization, [or] medical or surgical treatment" under the auspices of the Department of Veterans Affairs (VA), a veteran suffers an injury, or the aggravation of an injury, which causes additional disability or death. Pet. App. 9-10 (citing Act of Sept. 2, 1958, Pub. L. No. 85-857, Pt. II, § 351, 72 Stat. 1124,[1] renumbered Section 1151 at Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a),

[1] The court of appeals cited 72 Stat. 1121, but the quoted language appears at 72 Stat. 1124.

105 Stat. 406). In *Brown* v. *Gardner*, 513 U.S. 115 (1994), this Court held that when a veteran's injuries result from an affirmative action by a VA employee, former Section 1151 does not require a "demonstration of fault" on the part of the VA. *Id.* at 119. Instead, former Section 1151 requires the claimant to "eliminat[e]" the possibility that the veteran's additional disability or death was a "remote consequence[ ]" of the VA's actions by demonstrating a "causal connection between the 'injury' or 'aggravation of an injury' and [VA] 'hospitalization, medical or surgical treatment.'" Pet. App. 10-11 (quoting *Gardner*, 513 U.S. at 119).

In response to this Court's decision in *Gardner*, Congress amended Section 1151 to include an express fault requirement. Pet. App. 9. The current version of 38 U.S.C. 1151 requires a claimant to demonstrate "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination." 38 U.S.C. 1151(a)(1)(A); see Pet. App. 9.

2. Petitioner's late husband, Isaac Roberson, served in the United States Army from 1956 through 1959. Pet. App. 2. His medical history included a heart attack in 1974 and two cerebrovascular accidents, or strokes, in 1974 and 1990, which left him with some paralysis. *Id.* at 2-3. In August 1995, a private physician diagnosed Mr. Roberson with cancer. *Id.* at 4. Mr. Roberson died two months later as a result of complications related to the cancer. *Ibid.*

During the last several years of his life, Mr. Roberson received medical care from both the VA and private facilities. Pet. App. 3. In March 1995, approximately five months before his cancer diagnosis,

Mr. Roberson was admitted to a VA hospital for respite care, which allows a period of rest for a patient's primary caregiver. See *ibid.* During that hospital stay, which would be his last in a VA facility, Mr. Roberson's only specific complaint was a "head cold." *Ibid.* In May 1995, approximately three months before his cancer diagnosis, Mr. Roberson was evaluated by a VA physician, who noted Mr. Roberson's increased use of assistive devices and attributed that use to Mr. Roberson's history of strokes. *Ibid.*

In June 1995, Mr. Roberson experienced slurred speech and intermittent vision impairment. Pet App. 3. Petitioner took Mr. Roberson to a private hospital, where he received a computed tomography (CT) scan, which yielded negative results. *Ibid.* Two months later, Mr. Roberson was admitted to the same private hospital, where he received another CT scan. *Id.* at 4. This time, the scan detected cancer, the origin of which a private physician opined "most likely" was the lung. *Ibid.* Mr. Roberson died two months later from complications associated with the cancer. *Ibid.*

3. Petitioner filed a claim for dependency and indemnity compensation pursuant to former 38 U.S.C. 1151. Pet. App. 4-5. Petitioner asserted that the VA's failure to diagnose Mr. Roberson's cancer at an earlier date had hastened his death. *Ibid.* In support of her claim, petitioner submitted a letter from a private consulting physician opining that, at the time of Mr. Roberson's diagnosis in August 1995, his cancer was "advanced." *Id.* at 7. The private physician further opined that Mr. Roberson's cancer had "advanced very quickly and had not been present for a long period of time." *Ibid.* The physician estimated the time of onset to be

between four and eight months before diagnosis, or between December 1994 and April 1995. See *ibid.*

4. Both the VA Regional Office and the Board of Veterans' Appeals (Board) initially denied petitioner's claim. Pet. App. 5. The United States Court of Appeals for Veterans Claims (Veterans Court) then remanded the case for further development, and the Board requested that VA physicians review the record. *Ibid.*; *id.* at 25. In response, two VA physicians opined that although the primary site of origin of Mr. Roberson's cancer was undetermined, "possible primary sites" included "head and neck tumors, prostate and bowel." *Ibid.* The physicians estimated the time of onset to be between four and six months before diagnosis, or between February and April 1995. See *id.* at 5-6. Examining the "multiple scans and x-rays" performed in 1995—including one performed just two days before Mr. Roberson's diagnosis, in which one of two brain metastases remained undetectable—the physicians concluded that Mr. Roberson's cancer "was first manifested in August 1995." *Id.* at 6. The physicians noted that Mr. Roberson "was not seen at the VA for medical treatment after March 18, 1995," and that "[i]n March, 1995, there was no evidence to suggest that cancer was present." *Id.* at 106.

The Board also asked the physicians to respond to specific questions, including (1) whether the "VA fail[ed], during a period of VA treatment, to diagnose the disorder which caused the veteran's death, when a physician exercising the degree of skill and care ordinarily required of the medical profession reasonably should have diagnosed the condition and rendered treatment"; and (2) whether Mr. Roberson "suffered any additional disability or death as a result of the VA's failure

to diagnose [his] cancer." Pet. App. 6. The physicians responded by explaining that "[t]here are no symptoms recorded during the episodes of VA treatment suggestive of a medical condition that warranted further investigation." *Ibid.* "In the absence of a history to suggest a disorder other than the multiple strokes, and in the absence of a change in physical findings to suggest a new or worsening process," the physicians opined, "further investigative studies were not clinically indicated." *Id.* at 6-7. The physicians also noted that the type of cancer Mr. Roberson had "usually, but not always, results in death within 10 months," although "[a]ny individual patient * * * may not follow this statistic." *Id.* at 7.

5. Considering the evidence of record, including the medical opinions offered by petitioner's private consulting physician and the VA doctors, the Board denied petitioner's claim. Pet. App. 7-8. The Board found "no evidence of record suggesting that VA treatment, specifically the lack of a diagnosis of [Mr. Roberson's] small cell carcinoma, had the effect of hastening [Mr. Roberson's] death." *Ibid.*

6. Petitioner appealed to the Veterans Court. Pet. App. 8. The Veterans Court affirmed the decision of the Board, see *id.* at 21-40, holding that petitioner "has not shown that VA should have diagnosed the veteran's cancer prior to his actual diagnosis," *id.* at 37.

7. The United States Court of Appeals for the Federal Circuit affirmed. Pet. App. 1-19. The court of appeals rejected petitioner's claim that the VA and the Veterans Court had "erroneously reinterpreted" this Court's ruling in *Brown* v. *Gardner*, *supra*, by "reinsert[ing] a negligence or fault standard into 38 U.S.C. § 1151." Pet. App. 12, 14, 18. The court of appeals distin-

guished *Gardner*, pointing out that *Gardner* involved surgical treatment, an affirmative act on the part of the VA, whereas this case involves an act of omission, namely the VA's alleged failure to diagnose and treat Mr. Roberson's cancer. *Id.* at 15.

Citing this Court's statement in *Gardner* that proximate cause is a "fundamental prerequisite to recovery" under former Section 1151, the court of appeals concluded that in a failure to diagnose or treat case, the "only way to show causation is to demonstrate that the VA failed to diagnose when it should have." Pet. App. 14-15 (citing *Gardner*, 513 U.S. at 119). The court of appeals found that petitioner's contrary argument "fails to provide a sufficiently discernable standard for distinguishing the 'failure to diagnose' claims that are compensable from those that are not." *Id.* at 14. The Federal Circuit therefore held that "to recover under the previous version of 38 U.S.C. § 1151 for an alleged failure to diagnose or a similar act of omission, a claimant must establish that the VA should have diagnosed or acted but failed to do so." *Id.* at 18. The court explained that "[t]his is not an element in addition to causation. Instead, it serves as the means of establishing the causal connection, or proximate cause, between the injury * * * and the VA treatment." *Ibid.* Because petitioner could not make this showing, the court of appeals affirmed the denial of benefits. *Id.* at 19.

ARGUMENT

Contrary to petitioner's contention (Pet. 14-15), the court of appeals' decision in this case does not conflict with this Court's decision in *Gardner*. Nor does it conflict, as petitioner claims (Pet. 9-13), with the plain lan-

guage of former Section 1151, or with the VA's decision to award benefits in cases involving acts of omission.

Moreover, the decision below lacks significant prospective importance because Congress amended the statutory language at issue in this case 15 years ago, and suits filed on or after October 1, 1997, will be governed by the current version of the statute. Finally, because the court of appeals' judgment may be affirmed on an alternative ground, petitioner would not be entitled to relief even under the legal standard she advocates. Further review is therefore unwarranted.

1. Petitioner acknowledges (Pet. 11) that proximate causation is a necessary element for an award of benefits under former 38 U.S.C. 1151. Petitioner contends (Pet. 9-12), however, that under this Court's decision in *Gardner*, she can demonstrate the requisite causation without proving that the VA should have diagnosed Mr. Roberson's condition. Petitioner reads *Gardner* too broadly. That case involved an affirmative act of commission by the VA, and the rule the Court announced cannot mechanically be applied to suits, like this one, in which the claimant alleges an act of omission such as a failure to diagnose.

In *Gardner*, this Court held that a veteran who had suffered injuries resulting from surgery at a VA hospital was not required to prove VA fault or negligence in order to demonstrate entitlement to benefits under former Section 1151. 513 U.S. 115. In reaching that conclusion, the Court noted that former Section 1151's "as a result of" language requires "a causal connection between the 'injury' or 'aggravation of an injury' and 'hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation'" at a VA facility. *Id.* at 119. This Court "assum[ed] that the connection is limited to

proximate causation so as to narrow the class of compensable cases," and found that the requisite "narrowing occurs by eliminating remote consequences." *Ibid.* In holding that claimants need not prove fault in cases involving VA's acts of commission, this Court made clear that it did not "intend to cast any doubt" on VA regulations excluding "coverage for incidents of a disease's or injury's natural progression," since "VA action is not the cause of the disability in these situations." *Id.* at 119 n.3. The Court in *Gardner* did not specifically address the requirements for demonstrating causation in former Section 1151 cases that are premised on an alleged failure to diagnose or treat.

As the Federal Circuit pointed out in this case, failure to diagnose or treat claims, which arise from acts of omission, raise questions and challenges distinct from those raised in cases like *Gardner*. Pet. App. 15. In cases involving acts of commission, a veteran can demonstrate that the VA's medical or surgical treatment caused an injury without also proving fault. Mr. Gardner, for example, could prove that the pain and weakness in his calf, ankle, and foot resulted from a VA surgery without demonstrating that the VA surgeon was negligent. See *Gardner*, 513 U.S. at 116. Absent any language in former Section 1151 suggesting that proof of fault was required, this Court found it "unreasonable" to construe the statute to require such a showing. *Id.* at 120. The Court specifically disclaimed any disagreement, however, with the VA's "regulations insofar as they exclude coverage for incidents of a disease's or injury's natural progression, occurring after the date of treatment." *Id.* at 119 n.3. The Court explained that "VA action is not the cause of the disability in these situations." *Ibid.*

By its plain terms, former Section 1151 requires petitioner to prove that Mr. Roberson's injury was caused by the VA "hospitalization, [or] medical or surgical treatment" Mr. Roberson actually received. In a case like *Gardner*, the determination that VA medical or surgical treatment "caused" a veteran's injury typically reflects the conclusion that the veteran would not have suffered the injury if he had not received the VA treatment. Petitioner, by contrast, does not contend that Mr. Roberson's death would have occurred at a later date if he had not been treated by VA physicians at all. Rather, in arguing (Pet. 14) that the VA's "delay in diagnosis and treatment hastened [Mr. Roberson's] death," petitioner contends that Mr. Roberson's death could have been postponed if he had received *different* diagnoses and treatment when he saw VA physicians during the first part of 1995.

It could be said with equal accuracy, however, that every private physician who examined or treated Mr. Roberson during the relevant period—and, for that matter, every layperson with whom Mr. Roberson came in contact—failed to diagnose his cancerous condition. Unless Mr. Roberson's interactions with VA physicians were such that those doctors *should have* diagnosed his condition, there is no basis for singling out the VA as the cause of any subsequent injury. Thus, absent proof that VA doctors ought to have diagnosed Mr. Roberson's condition at an earlier date, petitioner's contention that an earlier diagnosis could have prolonged his life (which is in any event unsupported by the record, see p. 12, *infra*) is an inadequate basis for concluding that the treatment he actually received was the cause of his injury.

While acknowledging that former Section 1151 requires proof of causation, petitioner asserts (Pet. 12)

that "other methods" exist to prove causation in failure to diagnose or treat cases. In particular, petitioner points to "*Gardner's* remote consequences analysis," as well as to 38 C.F.R. 3.358, which reiterates the causation element and requires a showing that any additional disability is not "merely coincidental" with treatment.[2] Pet. 12-13. But neither the cited regulation nor this Court's reference to "eliminating remote consequences" provides a test that can be applied to claims for benefits in cases involving acts of omission. See *Gardner*, 513 U.S. at 119; 38 C.F.R. 3.358. Rather, as the court of appeals found, petitioner's position "fails to provide a sufficiently discernable standard for distinguishing the 'failure to diagnose' claims that are compensable from those that are not." Pet. App. 14.

2. Petitioner also points out (Pet. 10) that former Section 1151 does not expressly distinguish between acts of omission and acts of commission. As previously noted, however, the statute's express causation requirement counsels in favor of the result reached by the court of appeals. In addition, and contrary to petitioner's contention (*ibid.*), the determination that benefits may be awarded for acts of omission does not dictate *how* a veteran must demonstrate entitlement to those benefits. As the Federal Circuit determined in this case, in order to satisfy former Section 1151's proximate causation requirement, a claimant must demonstrate that the VA should have, but did not, diagnose or treat the claimant's condition.

3. Further review is also unwarranted because the court of appeals' judgment has limited prospective

---

[2] Petitioner cites former 38 C.F.R. 3.357(c) (1990), but the quoted language is from the current version of 38 C.F.R. 3.358(c)(1) and (2).

significance. Fifteen years ago, Congress amended 38 U.S.C. 1151 to require a showing of fault for all claims. See Pet. App. 9 n.2 (citing Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, § 422(a), 110 Stat. 2927). The decision below will apply only to the narrow class of pending cases filed before October 1, 1997, see *id.* at 29, in which a veteran claims additional disability or death due to the VA's failure to diagnose or treat.

4. Finally, further review is unwarranted because alternative grounds support the court of appeals' judgment in this case. The plain language of former Section 1151 requires a veteran to show that the VA's action or inaction "result[ed] in additional disability to or the death of [the] veteran." 38 U.S.C. 1151 (1994). Even if former Section 1151 did not require petitioner to prove that the VA should have diagnosed Mr. Roberson's cancer, petitioner would still be required to demonstrate that "[t]he delay in diagnosis and treatment" that petitioner attributes to VA "hastened [Mr. Roberson's] death." Pet. 14; see 38 U.S.C. 1151.

Petitioner has made no such showing here. Indeed, the Board made a factual finding that "no evidence of record suggest[ed] that VA treatment, specifically the lack of a diagnosis of [Mr. Roberson's] small cell carcinoma, had the effect of hastening [Mr. Roberson's] death." Pet. App. 7-8 (quoting Bd. Vet. App. No. 96-46 017, 2005 WL 3916807). The court of appeals did not have jurisdiction to review that factual finding. See 38 U.S.C. 7292(d)(2) (absent a constitutional issue, court of appeals "may not review * * * a challenge to a factual determination"); Pet. App. 8. Accordingly, even if former Section 1151 does not require proof that

VA should have diagnosed Mr. Roberson's cancer, petitioner still cannot demonstrate the requisite causal connection between a failure to diagnose and Mr. Roberson's death. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
MARTIN F. HOCKEY, JR.
ALLISON KIDD-MILLER
Attorneys

JANUARY 2011